

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

BlueStar Energy Services, Inc.	:	
–vs–	:	
American Energy Solutions, Inc., Affiliate	:	08-0364
Power Purchasers International, LLC	:	
and Lower Electric LLC	:	
	:	
Verified Complaint Regarding Apparent	:	
Violations of 220 ILCS 5/160-115C.	:	

**STAFF’S BRIEF ON EXCEPTIONS**

NOW COME the Staff witnesses of the Illinois Commerce Commission (“Staff” and “Commission”), by and through their attorneys, and pursuant to Section 200.830 of the Illinois Commerce Commission’s Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submit their Brief on Exceptions to the Proposed Order (“PO”) issued by the Administrative Law Judge (“ALJ”) on June19, 2009.

Introduction

On June 4, 2008 BlueStar Energy Services, Inc. (“BlueStar”) filed a Complaint in this matter against, *inter alia*, Lower Electric LLC (“Lower”). Staff is not taking exception to the ultimate conclusions in the PO. However, Staff takes exception to some of the conclusions within the PO as they reach issues which need not be addressed in this docket and which are currently before the Commission in Docket No. 08-0548 (“Rulemaking Docket”).

## Argument

Staff concurs with the sentiment of the PO when it states, "...the proposed regulations in the Licensing Rulemaking have yet to come before the Commission, we will not reach any conclusions here." (PO, p. 11) Staff finds the analysis, in this PO, of the proposed definition of "attempts to procure" in the rulemaking docket to be unnecessary. The PO finds that Lower is an agent and subject to the ABC Law on another basis, therefore, the Commission need not address the "attempts to procure" definition here.

In addition, the discussion of the issue in this PO is inconsistent with the approach adopted in the Proposed Order which was issued in the Rulemaking Docket. The definition of "attempts to procure" is a contested issue in the Rulemaking Docket. Several interested parties and Staff have weighed in on the issue there. The decision is squarely before the Commission in the Rulemaking Docket, whereas an analysis of the issue is not necessary in this docket. The Commission should defer opining on the issue until it enters its Final Order in the Rulemaking Docket.

## Replacement Language

### **D. ISSUES PRESENTED**

The stipulated facts establish that Lower, while acting as an agent for Strategic Energy (an ARES), solicited a customer for the purpose of selling retail electricity from Strategic Energy to that customer. No disclosure of Lower's anticipated remuneration from Strategic Energy was made to the customer. Without more, Lower's disclosure failure is a *prima facie* violation of subsection (e)(1) of the ABC Law. However, the parties frame several issues that call into question whether a violation has actually occurred and whether any penalty can and should be imposed. Those issues are:

whether the ABC Law's disclosure requirements are applicable to ABCs before the Commission creates the licensure requirements contemplated by subsection (d) of the ABC Law;

whether Lower was ~~not~~, at the time of the pertinent solicitation, an agent within the meaning of subsection (b) of the ABC Law ~~because it had no authority to purchase, or enter into a contract to purchase, retail electric service from an ARES;~~

whether Lower was not an agent within the meaning of subsection (b) of the ABC Law because it was acting exclusively on behalf of a single ARES (Strategic Energy) *and* had disclosed that exclusivity to the customer *or* was not required to disclose that exclusivity;

whether penalty for violation of the ABC Law should not be imposed in this instance because any violation by Lower was *de minimis* or committed in good faith;

whether the Commission can impose the penalty prescribed by the ABC Law before Lower has been licensed pursuant to administrative regulations created by the Commission.

The Commission will address each of these issues below.

\* \* \* \* \*

**1. Whether Lower was ~~not~~, at the time of the pertinent solicitation, an ABC within the meaning of subsection (b) of the ABC Law ~~because it had no authority to purchase, or enter into a contract to purchase, retail electric service from an ARES.~~**

"ABC" is the acronym for what subsection (b) of the law more specifically describes as "agents brokers and consultants engaged in the procurement or sale of retail electricity supply for third parties."<sup>1</sup> An ABC is defined in subsection (b) as "any person or entity that attempts to procure on behalf of or sell electric service to an electric customer in the State."<sup>2</sup> Lower contends that it was not an ABC within that definition because it had no authority to purchase (or execute a contract to purchase) electricity for the customer it solicited<sup>3</sup>.

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<sup>1</sup> 220 ILCS 5/16-115C(b).

<sup>2</sup> *Id.*

<sup>3</sup> Lower SJ Motion at 3-4. The absence of such purchasing or contracting authority is a stipulated fact in this case. Joint Ex. 1, para. 8.

Initially, we note that Lower's arguments concerning the ABC definition in subsection (b) are framed solely in relation to the conduct constraints in subsection (e). Given that this complaint is about a violation of subsection (e)(1), Lower's approach is certainly not unreasonable. However, in the ABC Law as a whole, the subsection (b) definition determines not only who must comply with the constraints in subsection (e), but also who must obtain an ABC's license under subsection (c). Consequently, as the Commission construes the statutory definition of an ABC, we must arrive at a result that serves the two-pronged legislative purpose of identifying the persons and entities that must *both* obtain a license and submit to conduct controls. Moreover, that result must facilitate realization of the two purposes of the ABC Law expressly set forth in subsection (a) – protection of consumers from unfair or deceptive practices and notice to ABCs of the illegality of such practices

~~For several reasons, the Commission holds that the absence of purchasing authority does not place Lower outside the definition of an ABC. Therefore, such absence did not relieve Lower of its responsibility under subsection (e) of the ABC Law to disclose its anticipated remuneration.~~

~~First, customer purchasing authorization is not an element in the statutory definition of an ABC in subsection (b) of the statute. Indeed, no part of the ABC Law expressly mentions such authorization. The obverse of that proposition is also true – where subsection (b) explicitly describes the persons and entities that are *not* ABCs, it does not mention persons or entities lacking purchasing authority. Simply, such authority is not on the face of the law.~~

~~Customer authorization does appear in a proposed definition of “attempts to procure” included in the ALJ’s Proposed Order in the ongoing Licensing Rulemaking<sup>4</sup>. But that definition has not been adopted by the Commission. Moreover, whatever its future viability, the definition was not in place at the time Lower made the solicitation pertinent to the instant complaint. (Ironically, as previously discussed, it is Lower that objects to retroactive application of an after-the-fact administrative regulation as “grossly unfair.”<sup>5</sup>) We are not applying the proposed definition here.~~

~~Second, nothing in the overall text of the ABC Law plainly implies that a customer’s contracting authorization is necessary in order for the law’s licensing and conduct provisions to apply to a person or entity~~

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<sup>4</sup> “‘Attempts to procure’ means: (1) taking action...by an individual or entity with authority from one or more retail electric customers to purchase or enter into a contract to purchase the services of a RES on said customer’s behalf.” Proposed Order, Dckt. 08-0548, Appendix, Proposed Sec. 454.20, Jan. 15, 2009.

<sup>5</sup> Lower SJ Motion at 8.

~~involved in electricity procurement for a third party. To the contrary, the text of the law more apparently suggests that an authorization requirement would be contrary to the law's stated intentions. The ABC Law is not merely aimed at purchasing agents. It is aimed at persons and entities engaged in a broader range of electricity procurement activities. For example, by its terms, the ABC Law regulates consultants (the "C" in ABC), a category of persons who render expert advice<sup>6</sup> without (at least necessarily) having purchasing authority. Lower's interpretation of the ABC definition would allow such a person to avoid the safeguards afforded by licensing (including among others, the technical competence requirement of subsection (d)(1)), while depriving customers of the ABC Law's protections against deceptive acts. Even an agent with a customer's authority to solicit bids and screen them (but not make purchasing decisions) would avoid the ABC Law's obligations—thereby frustrating its purposes—if Lower's purchasing authority requirement were read into the law.~~

~~That said, since However, the proposed regulations in the Licensing Rulemaking have yet to come before the Commission, therefore, we will not reach any conclusions here. It is sufficient at this juncture to say that ABC Law does not manifestly imply a buyer's authorization requirement - and unless and until we conclude in the rulemaking that such a requirement is both a reasonable and allowable mechanism for implementing the law, the Commission will not engraft that requirement on the statute.~~

~~Third, even if the regulations included in the Proposed Order in the Licensing Rulemaking had been applicable to Lower's activities at the time of the solicitation involved in this case (in April 2008), t The Commission finds that Lower was acting on behalf of an electricity seller (Strategic Energy), not a buyer. It is a stipulated fact that Lower was acting "in its capacity as an agent for Strategic Energy" in the pertinent solicitation<sup>7</sup>. Since Lower was thus attempting to sell electricity, it would not have mattered (assuming solely for the sake of argument that the proposed regulations were applicable at all) that Lower had no authorization to procure electricity for the solicited customer. The proposed definition of an ABC that *attempts to sell* electricity contains no authorization~~

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<sup>6</sup> ~~Webster's New World Dictionary, Second College Edition (Simon and Schuster), defines a "consultant" as: "1) a person who consults with another or others; 2) an expert who is called upon for professional or technical advice or opinions."~~

<sup>7</sup> ~~Joint Ex. 1, para. 3.~~

requirement<sup>8</sup>. Rather, that definition requires that the agent receive remuneration from a RES<sup>9</sup>, and those facts are stipulated here<sup>10</sup>.

In sum, the absence of contracting authorization from the solicited customer did not exclude Lower from the definition of an ABC or relieve Lower of its disclosure obligations under subsection (e) of the ABC Law.

\* \* \* \* \*

## D. CONCLUSION

The parties' joint fact Stipulation establishes that Lower solicited a customer on behalf of an electricity seller (Strategic Energy) without making the disclosure of anticipated remuneration required by subsection (e)(1) of the ABC Law. That constitutes a violation of the law.

Lower's legal defenses do not preclude a finding of violation pursuant to subsection (g) of the law. The ABC Law's disclosure requirements are applicable to ABCs before the Commission creates licensure requirements. Lower was acting "in its capacity as an agent" on behalf of an electricity seller in the pertinent solicitation. Thus, Lower was an agent within the meaning of subsection (b) of the ABC Law when it made the pertinent solicitation. Given this finding, Lower's ~~its~~ lack of purchasing authority on behalf of the solicited customer was irrelevant to its ABC status, ~~and it~~ Further, Lower was not acting exclusively on behalf of a single ARES within the meaning of subsection (b). Lower's violation of subsection (e)(1) is neither vitiated nor excused on the bases asserted by Lower (that no customer harm was proven, that the violation was trivial or that it was committed in good faith). The Commission is empowered to render a finding of violation and impose a prospective license suspension penalty on unlicensed persons or entities.

Therefore, BlueStar's motion for summary judgment is granted and Lower's motion for summary judgment is denied. The Commission finds that Lower has violated the ABC Law. That violation is Lower's first violation of the ABC Law. On that basis, the Commission will order that any ABC license subsequently awarded to Lower will be suspended for one month, as provided in subsection (g) of the law.

<sup>8</sup> "'Attempts to sell' means: (1) taking action which constitutes a substantial step, such as but not limited to; soliciting customers, making offers or preparing contracts, toward the sale of electric power and energy; (2) by an individual or entity who receives compensation, salary or other remuneration from a RES." Proposed Order, Dckt. 08-0548, Appendix, Proposed Sec. 454.20, Jan. 15, 2009.

<sup>9</sup> *Id.*

<sup>10</sup> Joint Ex. 1, para. 3 & 8.

WHEREFORE, Staff respectfully requests that its Exceptions to the Proposed Order issued in this proceeding be considered.

July 8, 2009

Respectfully submitted,



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